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The Supreme Court And Religious Liberty

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In this article, I review recent developments in the Supreme Court, and closely related developments elsewhere, with respect to the free exercise of religion, the establishment of religion, and federalism. I highlight the current rules to the extent they can be identified, the deep ambiguities in some of those rules, and the most promising arguments for lawyers asserting religious liberty claims. I give extra attention to free exercise, where recent developments are most subject to misunderstanding. I speak from dual experience as an academic who studies the Court and as an advocate who has appeared in several of the cases discussed, on behalf of parties or amici.

I. REMAINING PROTECTIONS FOR FREE EXERCISE OF RELIGION

It is by now familiar history that *Employment Division v. Smith*[1] sharply cut back on free exercise protections. Under *Smith*, a regulatory burden on religious exercise requires no justification if it is imposed by a neutral and generally applicable law. There appear to be three votes to overrule *Smith*,[2] and four votes to reaffirm it.[3] Justices Ginsburg and Thomas have given no public hint of what they think, although they have had ample opportunity to criticize *Smith* if they are so inclined. No one has squarely asked the Court to overrule *Smith*, and probably someone should, but there is no obvious and attractive strategy for doing so. Certainly, litigants should urge narrow interpretations of *Smith*. It may be much easier to get five votes to expand *Smith*'s exceptions or interpret it more generously to religious liberty than

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[1] 494 U.S. 872 (1990).

[2] *See* City of Boerne v. Flores, 521 U.S. 507, 544–65 (O'Connor, J., dissenting); *id.* at 565–66 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

[3] Chief Justice Rehnquist, and Justices Stevens, Scalia, and Kennedy were part of the *Smith* majority.

to get five votes to squarely overrule it.

The key concept in *Smith* is "neutral and generally applicable law," and the Court gave some content to that requirement in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[4] So now we have the *Smith/Lukumi* test, but we have considerable disagreement over what exactly that test means. Perhaps the most important point about *Smith/Lukumi* is that lawyers for religious claimants should not despair prematurely.

In the effort to explain *Smith*'s problems to Congress and to the public, proponents of free exercise have given it a worst-case interpretation and quite likely exaggerated its harmful consequences.[5] Sometimes worst-case interpretations are right, and *Smith* may be as bad as its strongest critics made it out to be. There are certainly lower court decisions that give it a worst-case interpretation, especially in the period from 1990 to 1993, after *Smith* and before *Lukumi*. But there are also much more promising interpretations that would greatly complicate the litigation but give free exercise claimants a plausible claim more often than not. Call the pessimistic scenario the Religious Bigotry Interpretation; claimants might have to prove that the law resulted from religious bigotry. Call the optimistic scenario the General Applicability Interpretation; claimants would have to prove only that the law is not generally applicable. The word "bigotry" does not appear either in *Smith* or in *Lukumi*, but the bad news is that in *Boerne*, Justice Kennedy used that word to summarize the *Smith* test.[6]

The requirement that *Smith* actually lays down is general applicability. If a law burdens the exercise of religion, it requires compelling justification unless it is neutral and generally applicable.[7] Taking "generally applicable" at its literal English

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[4] 508 U.S. 520 (1993).

[5] *See* Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 771–80 (1998) (reviewing and analyzing the arguments made in support of the Religious Freedom Restoration Act).

[6] *See Boerne*, 521 U.S. at 535 ("In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.").

[7] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542 (1993) ("laws burdening religious practice must be of general applicability"); Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (holding that no free exercise issue arises if the burden on religious exercise is "merely the incidental effect of a generally applicable and otherwise valid provision"). For further analysis, see Richard F. Duncan, *Free Exercise at the Millennium: Smith, Lukumi and the General Applicability Requirement* (forthcoming manuscript on file with author) (arguing that

meaning, the law has to apply to everyone, or nearly everyone, or else the burden on religious exercise must be justified under the compelling interest test.

Government lawyers routinely adopt some version of the Religious Bigotry Interpretation. They argue that under *Smith* and *Lukumi*, religious claimants must prove that government officials acted out of an anti-religious motive. If that is the standard, provable free exercise violations do not happen very often. Officials do sometimes act out of anti-religious motives; hostility to religious fundamentalists and minority religions is very widespread. But when officials act on such motives, and certainly in the more common case of anti-religious motives mixed in with a range of other motives, it is almost impossible to prove the anti-religious motive to the satisfaction of a judge. The Religious Bigotry Interpretation makes *Smith* and *Lukumi* close to worthless as a protection for free exercise. If that interpretation prevails, then we really do have the worst case.

There are lower court opinions that read *Smith* that way. *Cornerstone Bible Church v. City of Hastings*[8] involved a zoning ordinance with explicit rules about churches. Churches were expressly permitted in residential zones, and by unambiguous omission from a list of permitted uses, churches were excluded from commercial zones. The court said that the exclusion of churches from commercial zones was a generally applicable law, even though it was a special rule about churches, because there was no evidence of anti-religious motive.[9]

A more recent example is *Swanson v. Guthrie Independent School District.*[10] The case had not been very well briefed, and the RFRA claims and the free exercise claims had been jumbled together. The best thing that happened in that case was a holding that plaintiff had waived her free exercise claim;[11] otherwise the

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death of Free Exercise Clause has been greatly exaggerated).

[8] 948 F.2d 464 (8th Cir. 1991).

[9] *Id.* at 472 ("There is no evidence that the City has an anti-religious purpose in enforcing the ordinance. Absent evidence of the City's intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability"). The court did subject the discrimination against churches to rational basis scrutiny under the Equal Protection Clause, and found no rational basis in the City's motion for summary judgment. *Id.* at 471–72 & n.13.

[10] 135 F.3d 694 (10th Cir. 1998).

[11] *See id.* at 698 ("Since the argument now advanced by Plaintiffs was not made below or ruled on by the district court, we will not address it for the first time on appeal.").

court would have rejected that claim on the merits. That was plainly a court that, without the benefit of good briefing, instinctively read the Religious Bigotry Interpretation into *Lukumi* and *Smith*.

Such opinions are indefensible after *Lukumi*. Whatever else it may be, *Lukumi* is not a motive case. The lead opinion explicitly relies on the city's motive to exclude a particular religious group—and that part of the opinion has only two votes. So whatever the holding is, it is not a holding about motive. We have two votes for motive;[12] we have three votes with no need to consider motive because they think that *Smith* was wrongly decided;[13] we have two votes that say *Smith* was right, but motive is irrelevant to *Smith*;[14] and we have two votes that said nothing about motive one way or the other.[15] Seven Justices failed to find bad motive, but nine voted to strike down the ordinances.

If a religious claimant has evidence of bad motive, it should offer that evidence. Such evidence tends to discredit the government, and it makes the judge more sympathetic. But religious claimants should never ever concede that they have to prove bad motive in order to make out a free exercise claim.

Lukumi, as extreme as the facts are, is a case about objectively unequal treatment.[16] The city had one rule for the religiously-motivated killing of animals, a different rule for nearly all the other reasons for killing animals, and different rules for other activities that generated the same kinds of harms. The ordinances that prohibited religious killings of animals were not generally applicable. Whatever the reasons for the lines the city drew, the unequal treatment of religious and secular killings required compelling justification.

The fallback position for the government side is this: even if *Lukumi* means the religious claimant does not have to prove bad motive, she still has to prove that religion is uniquely singled out for a burden that applies to no one else, because those were the

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[12] *See Lukumi*, 508 U.S. at 522, 540–42 (Kennedy, J., announcing the judgment).

[13] *Id.* at 565–77 (Souter, J., concurring); *id.* at 577–80 (Blackmun, J., joined by O'Connor, J., concurring).

[14] *Id.* at 557–59 (Scalia, J., joined by Rehnquist, C.J., concurring).

[15] *Id.* at 522 (noting that White and Thomas, J.J., joined the opinion of the Court but did not join part II-A-2 (on motive), and did not write separately).

[16] *Id.* at 542 ("The Free Exercise Clause 'protect[s] religious observers against unequal treatment' " (opinion of the Court) (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring))).

facts of *Lukumi*. The ordinances did not affect any other significant reasons for killing an animal. The city's effort to show other possible applications was reduced to weird hypotheticals. So governments argue that laws are valid unless they are as extreme as the laws in *Lukumi*. Even if the test is not bad motive, even if the test is objectively differential treatment, governments say that religion has to be *uniquely* burdened.

Religious claimants have an answer there, too. The Court expressly says that it does not know how general the law has to be before it is generally applicable, but that the Hialeah laws did not even come close. "[T]hese ordinances fall well below the minimum standard necessary to protect First Amendment rights."[17] *Lukumi* was an extreme case, but burdensome laws do not have to be that extreme before there is a plausible free exercise claim. The minimum standard of generality required by the Free Exercise Clause is much higher than what Hialeah did in *Lukumi*.

Lukumi also talks about different ways in which one can prove lack of general applicability. They are jumbled together; it is not a good CLE opinion, but it offers much ammunition to those who read carefully. The most important thing to understand is that regulatory categories are not self-defining. The government likes to focus on the narrow law under challenge, and claim that the law is generally applicable to everything that it applies to. The city in *Lukumi* said that nobody could sacrifice; it had enacted a generally applicable law against sacrifice.[18] Plaintiffs said that sacrifice was not a relevant category. Killing animals was the relevant conduct, and there was nothing even close to a generally applicable law against killing animals.

The wave of bankruptcy cases against churches provides a less obvious illustration of the General Applicability Interpretation. There were hundreds of these lawsuits in which trustees in bankruptcy sued to recover contributions that a member made to the church before the contributor went bankrupt.[19] Congress has

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[17] *Id.* at 543.

[18] *See id.* at 544 (summarizing the city's argument).

[19] The leading and most intensively litigated case was *Christians v. Crystal Evangelical Free Church (In re Young)*, 148 B.R. 886 (Bankr. D. Minn. 1992) (entering judgment against church), *aff'd*, 152 B.R. 939 (D. Minn. 1993), *rev'd*, 82 F.3d 1407 (8th Cir. 1996) (holding that RFRA overrode the trustee's claim), *reh'g en banc denied*, 89 F.3d 494 (8th Cir. 1996), *vacated*, 521 U.S. 1114 (1997) (remanding for consideration in light of *Boerne*), *on remand*, 141 F.3d 854 (8th Cir. 1998) (upholding constitutionality of RFRA as applied to federal law), *cert. denied*, 525 U.S. 811 (1998).

solved the problem with a statutory amendment,[20] but the contrast between the truly general rule of the Bankruptcy Code, and the assertedly general rule of one narrow subsection of the Bankruptcy Code, still makes a good example of the battle over categorization.

Under the Bankruptcy Code as it existed prior to June 1998, the trustee would sue the church for an amount equal to the contributed funds. The contributed money had long since been spent; these were really demands that the church divert current contributions to pay the creditors of a bankrupt member. These cases were brought under section 548(a)(2) of the Bankruptcy Code, and the government, as intervenor in one of these cases, argued that section 548(a)(2) was generally applicable to everything it applied to.[21] In any case that fell within section 548(a)(2), the creditors won and the transferee lost. The government also appeared to argue that under *Smith* and *Lukumi*, the category defined by the challenged statute did not even have to be rational.[22]

Churches responded that the court had to consider the whole Bankruptcy Code. The general rule in bankruptcy is that if creditors lose the trustee can not reach any money and the creditors do not get paid. There are thousands of transactions in the economic life of a typical debtor in the last year before bankruptcy, and nearly all these transactions dissipate funds that

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Other examples include *Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge)*, 220 B.R. 386 (D. Idaho 1998); *Morris v. Midway S. Baptist Church (In re Newman)*, 203 B.R. 468 (D. Kan. 1996); *Geltzer v. Crossroads Tabernacle (In re Rivera)*, 214 B.R. 101 (Bankr. S.D.N.Y. 1997); *Weinman v. Word of Life Christian Ctr. (In re Bloch)*, 207 B.R. 944 (D. Colo. 1997); *Ellenberg v. Chapel Hill Harvester Church, Inc. (In re Moses)*, 59 B.R. 815 (Bankr. N.D. Ga. 1986); *Wilson v. Upreach Ministries (In re Missionary Baptist Found. of Am., Inc.)* 24 B.R. 973 (Bankr. N.D. Tex. 1982). Variations on these claims include *In re Tessier*, 190 B.R. 396 (Bankr. D. Mont. 1995), *appeal dis'd*, 127 F.3d 1106 (9th Cir. 1997) (trustee challenged contributions to church included in chapter 13 plan), and *Cedar Bayou Baptist Church v. Gregory-Edwards, Inc.*, 987 S.W.2d 156 (Tex. App.—Houston [14th Dist.] 1999) (claim brought by individual creditor after trustee refused to assert it).

[20] Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. 105-183, 112 Stat. 517 (1998) (principally codified in 11 U.S.C. §§ 544, 548, and 1325 (Supp. IV 1998)).

[21] *See* Supplemental Brief for Intervenor United States of America at 12, Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998) (arguing that "the statute establishes a defined category of contributions" and "operates to void all such transfers"). Usually the government is not a party in private bankruptcy cases, but trustees in bankruptcy made similar arguments.

[22] *See id.* at 20 ("the rational basis for this statutory distinction is not at issue here").

could have been used to pay creditors. Only a tiny handful of those transactions are ever set aside under section 548(a)(2) or any other section; in most of these cases, only gifts to the church were set aside. Churches were becoming the principal source of funds available for distribution in consumer bankruptcies. That is not a generally applicable law. Gifts to the church were singled out from all the debtor's money-losing transactions.[23]

The government's argument, both in *Lukumi* and in the bankruptcy cases, was entirely circular. It insisted that the challenged law defined the relevant category and that the challenged law was generally applicable to that category. *Lukumi* rejected this argument in multiple ways. First, *Lukumi* said that if the prohibition is narrow in scope, that is evidence that the law is not neutral (a separate requirement that overlaps with general applicability.)[24] Second, the Court in *Lukumi* refused to confine its analysis to the challenged ordinances; it considered the whole body of Hialeah and Florida law on killing of animals and on cruelty to animals.[25]

Most important, *Lukumi* said that if there are other activities that cause comparable harms to the same governmental interests, and those activities are not regulated, the law is not generally applicable.[26] The unregulated activity does not even have to be the same activity with a secular motive; it can be a different activity with the same effect. One of the great pieces of evidence in *Lukumi* was when the city's public health expert said that the garbage bins outside of restaurants were a much bigger health problem than people leaving sacrificed chickens in the street. Of course, the city did not ban restaurants to avoid the problem of restaurant garbage, but it banned sacrifice to avoid sacrifice garbage. So the sacrifice ordinances were not generally applicable laws.[27]

Sometimes the government responds to this kind of argument

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[23] *See* Brief of Appellant on Remand from the Supreme Court of the United States at 24–31, Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998).

[24] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) ("A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.").

[25] *See id.* at 537, 539, 543–45.

[26] *See id.* at 543 ("The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree.").

[27] *See id.* at 544–45.

by emphasizing *Smith*'s language about "individualized exceptions." Government concedes arguendo that if it makes *individualized* secular exceptions, then maybe it has to make religious exceptions, but it insists that *categorical* exceptions do not trigger serious judicial review. That distinction makes no sense. Wholesale secular exceptions make the law even less generally applicable than individualized secular exceptions.[28] But *Smith* did talk about individualized exceptions when it explained the unemployment compensation cases.[29] *Lukumi* did not explicitly clarify that language, but it plainly relied on categorical exceptions to show that the rule against killing animals was not neutral and generally applicable. The city allowed fishing in the city; the animal cruelty laws had an exception for medical experiments; they had an exception for pest control and exterminators. The Court relied on these and other categorical exceptions.[30] The Court said that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice."[31]

Evidence of uneven enforcement can also be very helpful. Religious claimants should show that the government is granting exceptions under the table, or enforcing the rule only or disproportionately against churches or religiously motivated violators, or enforcing the law unevenly in some other way—if those facts are available. Such evidence shows that the law is not generally applicable in fact.

I want to note some of the more promising lower court examples. *Fraternal Order of Police v. City of Newark*[32] is the leading case at the moment. Muslim police officers, required by their faith to wear beards, challenged the city's requirement that police officers be clean shaven. The rule had two exceptions—one for medical conditions that made shaving difficult, and one for undercover officers. The court held that the medical exception undermined the city's interest in uniformity in the same way as a religious exception, and that the existence of this single secular

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[28] *See* Fraternal Order of Police v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 56 (1999).

[29] *See* Employment Division v. Smith, 494 U.S. 872, 884 (1990) ("[W]here the state has in place of a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

[30] *See Lukumi*, 508 U.S. at 543–44 (listing such exceptions).

[31] *Id.* at 542.

[32] 170 F.3d 359 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 56 (1999).

exception made the rule not generally applicable.

> [T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not.[33]

The court said that the exception for undercover officers would not trigger heightened scrutiny. That exception was entirely outside the scope of the rule—undercover officers were not supposed to be recognized as officers—and so it reflected no willingness to sacrifice the interest in uniformity to the needs of individual officers, and thus no comparative judgment about the relative importance of undercover operations and the free exercise of religion. But the contrast between the medical exception and the refusal of religious exceptions did reflect a judgment—that an officer's free exercise of religion was less important than other important individual needs.

Keeler v. Mayor of Cumberland[34] is a landmarking case involving an old building owned by a Catholic church in Cumberland, Maryland. In that case, there were three exceptions on the face of the landmark ordinance—for substantial benefit to city, undue financial hardship to owner, and best interests of a majority of the community.[35] It is not clear that these exceptions had ever been applied, but they were part of the law, and that was enough. The court held that the Free Exercise Clause requires a religious exception if the city recognizes secular exceptions.[36] The court might also have noted that these exceptions were so vague that they effectively required individualized decisions to grant or withhold exceptions. Indeed, if such vague exceptions are actually used, they are a virtual invitation for uneven enforcement, in which government grants exceptions to the politically powerful or well connected, or to projects that happen to appeal to key members of the city council, but not to other claimants with fewer connections or less appeal.

Rader v. Johnston[37] shows how relevant exceptions can be found in the history of implementation as well as on the face of the

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[33] *Id.* at 366.
[34] 940 F. Supp. 879 (D. Md. 1996).
[35] *See id.* at 886.
[36] *See id.* at 886–87.
[37] 924 F. Supp. 1540 (D. Neb. 1996).

rule. *Rader* involved the University of Nebraska at Kearney and a rule that said all freshmen had to live in the dorm. Doug Rader was a freshman. He was an evangelical Protestant who wanted to live in the religious group house across the street from the campus. In discovery, he found data on the high rate of alcohol and drug abuse in the dorms. He said that living in the dorm was a near occasion of sin and that other dorm residents ridiculed his religious beliefs. He wanted to live in the religious group house where there was no record of any resident ever having a problem with alcohol, drugs, or sexual irresponsibility. There were very strict rules, and no one had ever been kicked out, because people complied with the rules.

Historically, freshmen had been allowed to live in the group house. Then the University got a new Vice-President for Student Affairs and she apparently ordered that there be no more religious exceptions. She actually testified that "students who did not wish to live in the residence halls for religious reasons should not attend UNK."[38]

The trial lawyer did his homework, discovered the facts, and here is what he proved. First, there were some open and categorical exceptions. Freshmen over nineteen did not have to live in the dorm. Freshman who were married did not have to live in the dorm. Freshmen living with their family in the Kearney community did not have to live in the dorm. There was an open, individualized exception: freshman with hardship situations did not have to live in the dorm. It turned out that hardship was liberally interpreted. Mothers of small children, freshmen with medical problems, and a freshman who was needed to drive his pregnant sister to and from campus had all gotten hardship exceptions. They did not have to live in the dorm. Then it turned out there were some hidden exceptions, completely unwritten. If your parents knew a regent or development officer well enough to ask for a favor, you did not have to live in the dorm. By the time plaintiff rested, it turned out that about a third of the freshmen had been exempted, and only two-thirds actually had to live in the dorm.[39] The court held that the University's rule was not generally applicable, and that the refusal of an exception for the religiously motivated student required a compelling interest.[40]

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[38] *Id.* at 1549. The quotation is the court's paraphrase of her testimony.

[39] *See id.* at 1546–47 (summarizing these exceptions).

[40] *See id.* at 1553.

These cases are a very far cry from *Lukumi*. In *Lukumi*, religion was singled out. Religion was the only thing that was burdened. In *Rader*, two-thirds of the freshmen were burdened. Only one-third were exempted, but that was enough. In *Fraternal Order of Police* and *Keeler*, the court did not even note how many people fit within the secular exceptions. It seems likely that the medical exception in *Fraternal Order of Police* exempted only a small minority of police officers, and it is entirely possible that the exceptions in *Keeler* existed only in theory. Yet each of these courts held that if government had secular exceptions for some, it could not refuse exceptions for the free exercise of religion. That is the General Applicability Interpretation of *Smith* and *Lukumi*, and it is the right interpretation. If *Smith* and *Lukumi* mean that, then religious claimants can often prevail, because the way the American legislative process works is to cut special deals and make exceptions for squeaky wheels. If you let out the interest group that complains the most, you have to let out the religious claimant as well.

It is very important that religious liberty claimants not give away the argument from the General Applicability Interpretation. If there are exceptions for secular interests, the religious claimant has to be treated as favorably as those who benefit from the secular exceptions. The logic of this argument is two-fold. First, the legislature cannot place a higher value on some well-connected secular interest group with no particular constitutional claim than it places on the free exercise of religion.[41] Second, part of the logic of *Smith* and *Lukumi* is that if burdensome laws must be applied to everyone, religious minorities will get substantial protection from the political process. The Court noted that the Hialeah ordinances appeared to be "a prohibition that society is prepared to impose upon [Santeria worshipers] but not upon itself."[42] And it continued: "This precise evil is what the requirement of general applicability is designed to prevent."[43] If a burdensome proposed

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[41] *See Lukumi*, 508 U.S. at 537–38 ("Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."); Fraternal Order of Police v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999) ("When the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.").

[42] *Lukumi*, 508 U.S. at 545 (quoting Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

[43] *Id.* at 545–46; *see also* Railway Express Agency, Inc. v. New York, 336 U.S. 106

law is generally applicable, other interest groups will oppose it, and it will not be enacted unless the benefits are sufficient to justify the costs. But this vicarious political protection breaks down very rapidly if the legislature is free to exempt any group that might have enough political power to prevent enactment, leaving a law applicable only to small religions with unusual practices and other groups too weak to prevent enactment.

There are also some other free exercise claims, not dependent on the General Applicability Interpretation, that survive *Smith* and *Lukumi*. These are simply outside the scope of the new rules. They could be forced into the new rules, but the Court was plainly not thinking about them in those terms. *Smith* reaffirms the line of cases holding that government may not "lend its power to one or the other side in controversies over religious authority or dogma."[44] These cases have not affected Catholics much, because even non-Catholic lawyers understand that the Roman Catholic Church is hierarchial. But all those cases remain good law and they have their uses. Secular courts cannot resolve an internal religious dispute, and especially not a doctrinal religious dispute, even in the guise of sorting out who owns a parcel of church property.[45]

Disputes between churches and their ministers have also been treated as outside the scope of *Smith* and *Lukumi*. So if a priest sues for employment discrimination, most courts still refuse to

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(1949):

> There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Id. at 112–13 (Jackson, J., concurring), quoted with approval by the Court, with respect to discrimination among religious faiths, in Larson v. Valente, 456 U.S. 228, 245–46 (1982).

[44] *Smith*, 494 U.S. at 877.

[45] For the difference between the formulation that courts should not resolve internal church disputes (thus guaranteeing each church's freedom to resolve such disputes internally), and the formulation that courts should not resolve disputes over religious doctrine (thus encouraging courts and litigants to ignore such issues and resolve the dispute on the basis of some allegedly non-doctrinal issue), see Douglas Laycock & Patrick Schiltz, Employment, in the Structure of American Churches: An Inquiry into the Impact of Legal Structures on Religious Freedom (James A. Serritella et al., ed., forthcoming 2001) (manuscript on file with the Center for Church/State Studies, DePaul College of Law).

hear those cases.[46] But even that rule is under attack and exceptions are beginning to appear.[47]

Catholics do get caught up in those cases sometimes, usually not with respect to the parish church, but with respect to other organizations—social service organizations, hospitals, orphanages—places where the hierarchial lines may not be so clearly understood. This argument figured prominently in a recent Texas case in which the Catholic Conference escaped vicarious liability in a major pedophile case. We tried to explain to the Supreme Court of Texas that the National Conference of Catholic Bishops was not really in the hierarchy—that bishops report to Rome and that the national conferences are membership organizations off to the side of the chain of command—that the Conferences did not have operational responsibility or supervisory authority over individual priests, and that an attempt to hold the Conferences liable was an attempt to reallocate religious authority among different religious organizations. Plaintiffs' claim was an attempt to say that some of the authority that belongs to the individual bishops also belongs to the Conferences, whether or not Catholics think it belongs there. That was a reallocation of religious authority that could not be permitted.[48]

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[46] *See, e.g.*, Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000); Combs v. Central Tex. Annual Conference, 173 F.3d 343 (5th Cir. 1999); EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996); Young v. Northern Ill. Conference, 21 F.3d 184 (7th Cir. 1994); Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991); Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985).

[47] *See* Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir. 1999) (holding that plaintiff had stated a claim that unremedied sexual harassment caused his constructive discharge as a Jesuit novice); *see also* Joanne Brant's forthcoming paper in *Proceedings of the 2000 Annual Meeting of the Association of American Law Schools Section on Law and Religion: Religion in the Workplace,* 4 EMPLOYEE RIGHTS & EMPLOYMENT POL'Y J. (forthcoming 2000) (appearing to argue that it is unconstitutional for courts not to decide disputes between churches and their clergy).

[48] The case is unreported; plaintiffs dismissed their claims against the Conference when the Supreme Court of Texas granted oral argument on a petition for mandamus to prevent discovery in the case. *See* United States Catholic Conference v. Ashby, No. 95-0250 (Tex. 1996). The underlying claims resulted in a large settlement between plaintiffs and the Diocese of Dallas. *See* Ed Housewright & Brooks Egerton, *Diocese, Kos Victims Settle for $23.4 Million; Bishop Apologizes, Vows to Prevent Abuse*, DALLAS MORNING NEWS, July 11, 1998 at 1A, *available in* 1998 WL 13086943.

Weaver v. Wood[49] is an interesting illustration from Massachusetts. Plaintiffs and the trial court sought to reallocate authority inside the Christian Science Church, even though there was no schism and the church governance structure was functioning. In effect, the lawsuit attempted to use the court to create a schism. Without announcing a very clear rule, the Supreme Judicial Court of Massachusetts refused to take the bait. The principle that civil courts cannot interfere with the allocation of religious authority survives *Smith*. That principle has many applications, not all of which are obvious, and religious claimants should be alert for those applications.

The application of this principle is clearest when a church employee or a subordinate church entity is suing a supervisory entity. It is less clear, and judges have more trouble and the results are more divided, in cases where an individual member sues and the claim is that plaintiff is suing the wrong entity or suing in a way that would force a church to change the way it relates to its clergy. When plaintiff is an individual member suing, courts often do not view the case as an internal church dispute. They should, but they do not; they are much more likely to view that individual member as an outsider. So there are very mixed results in these cases about allocation of religious authority, but the important point is that they are not directly affected by *Smith*.

Fraud claims against churches can be maintained if the fraud is temporal—if you take money to build a church and spend it to stay at the Ritz-Carlton. But if the church is sued for fraud because it promised eternal salvation and the plaintiff has decided she is not going to get it, there can be no fraud claim for that. The rule that courts cannot pass on the truth of religious teaching continues after *Smith*.[50]

II. THE RECENT FEDERALISM DECISIONS AND THE GROWING IMPORTANCE OF STATE LAW

As everyone knows by now, the Supreme Court in *City of Boerne v. Flores*[51] struck down the Religious Freedom Restoration

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[49] 680 N.E.2d 918 (Mass. 1997).

[50] *See, e.g.*, United States v. Ballard, 322 U.S. 78 (1944); Tilton v. Marshall, 925 S.W.2d 672 (Tex. 1996).

[51] 521 U.S. 507 (1997).

Act[52] (RFRA) as it applied to state and local governments.[53] *Boerne* is a remarkable opinion that is not limited to religious liberty; it rolled back congressional power to enforce the Civil War Amendments quite generally.[54] At the oral argument, it was as though the Civil War had never happened. The Solicitor of Ohio asked the Court to restore the Jeffersonian vision of the states as the guardians of liberty—in a Fourteenth Amendment case![55] The Civil War and the Fourteenth Amendment were precisely about establishing federal power to protect liberty in the states; whatever the reach of that change, "the states as the guardians of liberty" is emphatically not the vision of the Fourteenth Amendment.

The most striking thing about the opinion is how the logic of *Boerne* parallels the logic of *Lochner v. New York*.[56] The Court said that there are two reasons Congress might have passed RFRA. Congress might have done it to enforce the Court's understanding of free exercise. That would be a legitimate reason. Or Congress might have done it to enact Congress's own understanding of free exercise. That would be an illegitimate reason, according to the Court.[57] To the police that boundary, the Court said that it will decide *whether the statute was factually necessary* to enforce the judicial interpretation of free exercise.[58] The Court will decide for itself, without benefit of briefing or record, how many free exercise violations are out there. The Court thought that there were not very many, so that RFRA was not necessary for its legitimate purpose, and therefore, must have been enacted for its illegitimate purpose.

Similarly in *Lochner*, the Court said that New York might have limited the working hours of bakers for reasons of health or safety, which would be legitimate, or to protect bakers from economic exploitation, which would be illegitimate. The only way to prevent New York from dissembling about its motive was for the

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[52] 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

[53] City of Boerne v. Flores, 521 U.S. 507 (1997).

[54] *See generally* LAYCOCK, *supra* note 5 (elaborating on this theme).

[55] *See* Transcript of Oral Argument, City of Boerne v. Flores, 521 U.S. 507 (1997) (No. 95-2074), *available in* U.S. Trans. LEXIS 17, at *27.

[56] 198 U.S. 45 (1905). *Lochner* is the best known symbol of activist judicial review of economic substantive due process claims.

[57] *See Boerne*, 521 U.S. at 519–20 (distinguishing permitted remedial legislation to enforce the Fourteenth Amendment from forbidden substantive legislation expanding the terms of the Amendment).

[58] *See id.* at 529–32 (reviewing the need for RFRA and finding it unjustified as a remedial measure).

Court to decide for itself whether bakers need protection of their health and safety.[59]

RFRA remains valid as applied to federal law.[60] That is the position of the Clinton Administration,[61] and that seems clearly right. Congress's decision to limit the reach of its own statutes, to avoid unintended burdens on religious liberty, is in no way dependent on power to enforce the Fourteenth Amendment—the only power at issue in *Boerne*. Not every United States Attorney has gotten the word, but if the federal government or a private litigant challenges RFRA as applied to federal law, the Justice Department will intervene to defend the statute. It takes a narrow view of what RFRA means, but it is quite convinced that RFRA is constitutional.

On remand in light of *Boerne*, the Eighth Circuit upheld RFRA as applied to federal bankruptcy law.[62] The opinion deals with all the arguments—separation of powers, the source of congressional power under Article I, and the Establishment Clause. The dissent proceeds on the view that Congress can protect religious liberty against federal burdens—but only if it proceeds one statute at a time.[63] Congress could amend the Bankruptcy Code and amend the employment discrimination laws and then amend the labor laws. But the dissent claims that Congress can not protect religious liberty in a general statute like

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[59] *See Lochner*, 198 U.S. at 61 ("The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employes, to make contracts regarding labor upon such terms as they may think best.").

[60] *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998); EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996). Other courts have assumed RFRA's validity without deciding the issue, rejecting the RFRA claim on other grounds. *See* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831–34 (9th Cir. 1999); Adams v. Commissioner, 170 F.3d 173, 175 (3d Cir. 1999); Alamo v. Clay, 137 F.3d 1366, 1368 (D.C. Cir. 1998); Jackson v. District of Columbia, 89 F. Supp. 2d 48, 64 (D.D.C. 2000).

[61] *See* United States v. Sandia, 188 F.3d 1215, 1217 (10th Cir. 1999) (government argued that RFRA was constitutional and applicable); *Adams*, 170 F.3d at 175 (government conceded that RFRA was constitutional and applicable); *Alamo*, 137 F.3d at 1368 (same); *Jackson*, 89 F. Supp. 2d at 64 (District of Columbia defendants challenged constitutionality of RFRA, but Federal Bureau of Prisons did not); Brief for Intervenor United States of America, Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998) (vigorously defending constitutionality of RFRA against challenge by trustee in bankruptcy).

[62] *See* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

[63] *See id.* at 865–66 (Bogue, J., dissenting).

RFRA, because that is a disguised amendment to the Free Exercise Clause. This argument got a vote, which tells you that there is some judicial hostility to what Congress is trying to do.[64]

The decision in *Boerne* is part of a general invigoration and extension of doctrines to limit federal power. The Court has vigorously applied *Boerne* to other Enforcement Clause legislation, repeatedly finding that Congressional legislation to enforce the Fourteenth Amendment was unnecessary to solve any real problem.[65]

Another new federalism doctrine is that Congress cannot require the states to help enforce federal law. The lead decision here is *Printz v. United States*,[66] striking down a requirement that local law enforcement officials help screen gun-buyers for criminal records. *Printz* says that Congress can ask New York to help, just as it can ask Ontario to help, and it might get a cooperative answer. But the relationship is the same in either case. If New York chooses not to help, it has no obligation to help.

There are ways around *Printz*. Congress can use the spending power, which so far the Court has not cut back. Congress can ask the states to do something, give them money if they do it, and attach conditions to the grant of federal money.[67] There are those in the secular conservative movement who want to limit the spending power and especially limit the right to attach conditions to federal grants, in order to complete a sweep of shrinking congressional power to implement federal policy in the states.[68]

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[64] For commentary on the constitutionality of RFRA as applied to the federal government, compare Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 727–47 (1998) (arguing that RFRA is valid); with Marci Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998); Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410 (1998).

[65] *See* United States v. Morrison, 120 S. Ct. 1740 (2000) (invalidating private cause of action under Violence Against Women Act); Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (invalidating Age Discrimination in Employment Act, as applied to create monetary remedies against states); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (invalidating Patent Remedy Act, as applied to create monetary remedies against states); *but see* Lopez v. Monterey County, 525 U.S. 266 (1999) (upholding application of Voting Rights Act to non-covered jurisdiction in a covered state, describing legislation as remedial without considering whether it was necessary).

[66] 521 U.S. 898 (1997).

[67] *See* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding requirement that states accepting federal highway funds raise drinking age to twenty-one).

[68] *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L.

For the first time since 1936, the Court is striking down statutes as beyond the reach of the commerce power. The Court struck down the Gun Free Schools Act in *United States v. Lopez*,[69] and the Violence Against Women Act in *United States v. Morrison*,[70] and it construed the federal arson act narrowly in *Jones v. United States*,[71] in part to avoid asserted constitutional problems. Each of these cases involved regulation of noncommercial activity with economic consequences. These cases are less about what commerce is interstate and more about what counts as commerce in the first place. If they are confined to that, they draw an important line, but they do not limit Congressional power over commercial transactions. The opinions seem to reaffirm the traditional doctrine that Congress can regulate even small and local economic transactions if in the aggregate those transactions would affect interstate commerce.

There have been numerous recent decisions reinvigorating sovereign immunity doctrines, particularly state sovereign immunity. In *Seminole Tribe v. Florida*,[72] the Court eliminated congressional power to override Eleventh Amendment immunity, except in statutes to enforce the Fourteenth Amendment. Now we are getting a round of litigation to determine which Congressional power underlies each attempted override of state immunity.[73] Statutes that impose federal-court liability on the states are invalid if passed under Article I powers (with the possible exception of the spending power),[74] but are valid if passed under

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REV. 1911 (1995).

[69] 514 U.S. 549 (1995).

[70] 120 S. Ct. 1740 (2000).

[71] 120 S.Ct. 1904 (2000).

[72] 517 U.S. 44 (1996). This rule was extended to state-owned commercial enterprises in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and to state courts in *Alden v. Maine*, 527 U.S. 706 (1999).

[73] *See* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (holding that Age Discrimination in Employment Act is not valid legislation to enforce Fourteenth Amendment); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav Bank, 527 U.S. 627 (1999) (holding that Patent Remedy Act is not valid legislation to enforce Fourteenth Amendment); University of Ala. v. Garrett, 193 F.3d 1214 (11th Cir. 1999) (holding that Americans with Disabilities Act is valid legislation to enforce Fourteenth Amendment and overrides state sovereign immunity), *cert. granted*, 120 S. Ct. 1669 (2000); Lesage v. Texas, 158 F.3d 213 (5th Cir. 1998) (holding that Title VI of Civil Rights Act of 1964, or its implementing legislation, is valid legislation to enforce Fourteenth Amendment and overrides state sovereign immunity), *rev'd on other grounds*, 120 S. Ct. 467 (1999).

[74] *See* Pederson v. Louisiana State Univ., 213 F.3d 858, 875-76 (5th Cir. 2000) (holding that state waived its immunity when it accepted federal higher education

Fourteenth Amendment powers. That rule obviously intersects with *Boerne*. The Fourteenth Amendment powers were sharply narrowed in *Boerne*, so fewer laws can be passed overriding Eleventh Amendment immunity.

So far, there are limits to the federalism counter-revolution. The fundamental case that makes it possible to bring free exercise and other civil liberties litigation in federal court is *Ex parte Young*,[75] which held that a suit to enjoin constitutional violations by state officials is not a suit against the state, and thus not barred by sovereign immunity. This is a fiction, but an essential one if constitutional limits are to have much meaning. A government that cannot be sued can make a bill of rights meaningless; it can act lawlessly, not resorting to the courts in cases where citizens might raise a constitutional defense. Or it can set penalties so high that few citizens would dare violate a law to test its constitutionality. In *Idaho v. Coeur d'Alene Tribe*,[76] Justice Kennedy and Chief Justice Rehnquist wanted to rip the heart out of *Ex parte Young*,[77] but they only got their own votes.[78] So even for Justices Scalia, Thomas, and O'Connor, there are limits in this campaign to roll back federal authority. It is not clear what those limits are or where they originated, but they seem to exist.

It is equally unclear how far the roll back of federal power will go, but even as far as it has gone already, state law is assuming a much greater importance, particularly for the protection of free exercise of religion. State constitutions and state statutes matter; it is malpractice not to plead, brief, and fully develop your state constitutional free exercise claim. What often happens is that lawyers overlook the state constitution. We think federal constitutional law first. Or we tack the state claim on at the end of the complaint, but we do not spend the time to really develop it. There are few state cases and it is so much easier to cite the cases

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funds); Litman v. George Mason Univ., 186 F.3d 544, 548–51 (4th Cir. 1999) (same), *cert. denied*, 120 S. Ct. 1220 (2000).

[75] 209 U.S. 123 (1908) (holding that suit to enjoin state official from enforcing invalid state law is not a suit against the state for purposes of sovereign immunity).

[76] 521 U.S. 261 (1997).

[77] *See id.* at 270–80 (arguing that *Young* should apply only after case-by-case balancing of plaintiff's need for federal forum and state's interest in state forum) (Kennedy, J., announcing the judgment).

[78] *See id.* at 288–97 (O'Connor, J., joined by Scalia and Thomas, J.J., concurring) (rejecting Justice Kennedy's proposed changes in *Young*, but agreeing that the case fell within an exception to *Young*); *id.* at 297–319 (Souter J., joined by Stevens, Ginsburg, and Breyer, J.J., dissenting).

on the federal Free Exercise Clause—even if those cases are wrong and adverse to the interests of the client. Lawyers know how to argue from cases.

How do you make an argument when no cases have been decided yet? To really develop a state constitutional claim, you have to invest some time in it. You have to develop it in the trial court, and fully brief it on appeal, and you have to argue it from constitutional text, history, and first principles. The Supreme Court of Texas has said that it will not decide state constitutional claims that are just tacked on at the end. If you want that court to decide a state constitutional claim, you have to fully brief it, give the court the history of the state constitutional provision, and give the court a reason for interpreting the state clause differently from the corresponding federal clause.[79] I would not be surprised if other state courts reacted the same way. It is, however, worth spending the time to make that argument. Six states have now expressly rejected *Employment Division v. Smith*[80] as a matter of state constitutional law,[81] five more have decisions inconsistent with it,[82] and another has held the issue open in the face of conflicting precedents.[83] Most other state supreme courts have not had occasion to pass on the question. So it is essential to make the state constitutional argument and make it independently.

Eleven other states have enacted state Religious Freedom Restoration Acts,[84] and other states are actively considering such

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[79] *See* Tilton v. Marshall, 925 S.W.2d 672, 677 n.6 (Tex. 1996).

[80] 494 U.S. 872 (1990).

[81] *See* Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994) (rejecting *Smith*); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (same); Humphrey v Lane, 728 N.E.2d 1039 (Ohio 2000) (same); Hunt v. Hunt, 648 A.2d 843 (Vt. 1994) (same); Muns v. Martin, 930 P.2d 318 (Wash. 1997) (same); State v. Miller, 549 N.W.2d 235 (Wis. 1996) (same).

[82] *See* State v. Evans, 796 P.2d 178 (Kan. Ct. App. 1990) (ignoring *Smith* and adhering to pre-*Smith* law); Rupert v. City of Portland, 605 A.2d 63 (Me. 1992) (applying pre-*Smith* law but reserving issue of whether to change in light of *Smith*); *see also* Kentucky State Bd. for Elem. & Secondary Educ. v. Rudasill, 589 S.W.2d 877 (Ky. 1979); *In re* Brown, 478 So.2d 1033 (Miss. 1985); State *ex rel.* Swann v. Pack, 527 S.W.2d 99 (Tenn. 1975) (all pre-*Smith*).

[83] *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 929–31 (Cal. 1996).

[84] ALA. CONST., amend. 622; ARIZ. REV. STAT. ANN. §§ 41-1493.01 to 41-1493.02 (Supp. 1999); CONN. GEN. STAT. ANN. § 52-571b (Supp. 2000); FLA. STAT. ANN. §§ 761.01 to 761.05 (Supp. 2000); An Act Relating to the Free Exercise of Religion, 2000 Idaho Sess. Laws ch. 133 (to be codified at IDAHO STAT. §§ 73-401 to 73-404); 775 Ill. COMP. STAT. ANN. §§ 35/1 to 35/99 (Supp. 2000); An Act Relating to Religious Freedom, N.M. STAT. ch. 17 (2d Special Session 2000); An Act Relating to Religious

acts. Churches and civil liberties organizations should be actively supporting those bills, and lawyers for churches and religious claimants should be informed about the laws that already exist. The eleven states with RFRAs do not overlap the twelve states with protective interpretations of state free exercise clause. The bottom line here is that in at least twenty-three states, state law is plausibly read to require government to justify substantial burdens on religious exercise, without regard to whether the law is generally applicable or was motivated by religious bigotry. Some of these state RFRAs have exceptions, but most have none and all offer broad coverage. This body of state law gives much better protection to religious exercise than federal law does.

Even under the new federalism, Congress has some power to protect religious liberty under the Commerce Clause, under the Spending Clause, and under the Fourteenth Amendment where Congress can make a sufficient record. There will be lots of cases that such legislation simply cannot reach, so state law will remain important, but Congress can do much if it will. Congress has just passed the Religious Land Use and Institutionalized Persons Act,[85] which addresses the two largest sources of cases—prisons and land use regulation of churches. The Act also helps enforce the

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Freedom, 2000 Okla. Sess. Law Serv. ch. 272 (to be codified at OKLA. STAT. §§ 51-251 to 51-258); R.I. GEN. LAWS §§ 42-80.1-1 to 42-80.1-4 (1999); S.C. STAT. §§ 1-32-10 to 1-32-60 (available on Westlaw); TEX. CIV. PRAC. & REM. CODE §§110.001 to 110.012 (Supp. 2000).

Educating judges and lawyers about these statutes is a major task. The first reported decisions under the Florida RFRA completely misinterpreted the statute. The state court wholly failed to understand the difference between the RFRA standard and its alternatives. *See* First Baptist Church v. Miami-Dade County, 2000 WL 833077 (Fla. App. June 28, 2000) (equating Florida RFRA with *Lukumi* and with *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), a case that (unlike *Lukumi*) applied a balancing test to any burden on religion, but (unlike RFRA) did not require the city to show a compelling interest). The federal court understood the difference perfectly well and deliberately evaded the statute. *See* Warner v. City of Boca Raton, 64 F. Supp. 2d 1272, 1281–87 (S.D. Fla. 1999), *appeal pending* (holding that vertical grave markers were an unprotected religious preference not sufficiently connected to a protected religious tenet—despite express statutory language that religious exercise need not be required by a larger system of religious belief). The first Illinois decision understood the statute but applied a much weakened version of the compelling interest test. *See* City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc., 707 N.E.2d 53 (Ill. App. 1998), *appeal allowed*, 714 N.E.2d 525 (Ill. 1999).

[85] S2869 in the 106th Congress, *available in* Thomas, the Congressional website (visited Sept. 17, 2000) <http://thomas.loc.gov>. United States Code sections have not yet been assigned.

Free Exercise Clause by providing generally—not just in prison and land use cases—that if a claimant proves a prima facie case of a free exercise violation, the burden of persuasion shifts to the government on all elements of the claim except burden on religious exercise. So on questions such as whether unregulated secular activities are sufficiently analogous to make the law less than generally applicable, or whether the law was enacted with discriminatory or anti-religious motive, a prima facie case shifts the burden of persuasion to the government.

III. EXPLAINING RELIGION TO COURTS

Lots of lawyers do not understand what religion does. A judge is a lawyer who knew a politician; lots of judges do not understand what religion does either. There are many people, including many lawyers and judges, whose image of religion is of a great school marm in the sky who makes rules, and believers have to obey the rules, and that is religion. It follows in this view that you do not have a religious liberty claim unless you can point to a particular religious rule and say that you are being required to violate that rule.

It is remarkable how often this kind of argument arises in free exercise cases. Landmarking authorities in Boston told the Jesuits that they had no religious liberty right to re-orient the altar so that priests could face the people, because facing the people was only recommended—it was not required.[86] And there is actually some support for that view in the Supreme Court's opinion in *Jimmy Swaggart Ministries v. Board of Equalization*.[87]

So religious claimants often have to begin by getting over the concept of religion as compulsory rules. They have to explain to the court why religiously motivated conduct is part of the exercise of religion even if the conduct is not required. The legislative history of federal RFRA was good on that. Examples help make the point. No one is required to become a priest or a minister, but from any common sense perspective, doing so is part of the exercise of religion.[88]

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[86] *See* Boston Landmarks Comm'n v. Society of Jesus, 564 N.E.2d 571 (Mass. 1990).

[87] 493 U.S. 378 (1990).

[88] *See* McDaniel v. Paty, 435 U.S. 618 (1978) (protecting the right to become a minister).

Never be conclusory in your litigation of the burden issue. It may be obvious to you why the religious claimant has been burdened, but it is quite likely not obvious to the judge. Build your factual record. Think about all the possible ways to explain how religious liberty is burdened in your client's case. In the bankruptcy cases, creditors were reaching into the collection plate and taking back a thousand, ten thousand, and in one of the Texas cases, fifty thousand dollars.[89] Some judges did not see a burden there. Some of the judges that did see a burden thought it was only a burden on the donor. If the donor had anticipated the bankruptcy claim taking the money back from the church, he might have been deterred from giving. Judges had a hard problem with the most obvious point—there was a burden on the church that had to divert current contributions to pay a member's old debts.

In the *Boerne* case, the Court never reached the burden issue, but the city repeatedly claimed that there was no burden in that case. It was just money. No one said the bishop could not build a church. No one said the parishioners could not worship. If they would just spend an extra $750,000, they could solve this problem. That would be no burden. Or maybe it would be an economic burden, like what happens to General Motors, but it would not be a religious burden. This is a very widespread view, and lawyers for churches have to think about ways to explain and make comprehensible how the burden reaches religious exercise. These "mere" financial burdens divert funds from religious to secular purposes, they defeat the religious purposes of the donor of the funds, and they lead directly to reduced religious functioning. In effect, the City of Boerne said that the first call on St. Peter's resources was secular—that it must spend its first money to create what amounted to an architectural museum, and then if there was anything left over, it could build a place to worship. Building and maintaining the architectural museum was a prior condition on its right to build a place of worship.

Another way of thinking about this issue of compulsion versus motivation is to categorize different types of claims. Some religious liberty claims are claims of conscientious objection. The

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[89] *See* Cedar Bayou Baptist Church v. Gregory-Edwards, Inc., 987 S.W.2d 156 (Tex. App.—Houston [14th Dist.] 1999). The trial court entered judgment for $23,428 for contributions beginning October 15, 1988. *See id.* at 157. With accrued interest, the judgment was about $50,000 when it was reversed in 1999.

claimant's religion teaches that she just cannot do what the government is telling her to do, or that she must do some of what the government is telling her not to do. Catholic priests are not going to reveal what went on in the confessional, no matter what the government says.

Other kinds of religious liberty claims do not involve that kind of teaching. I call them church autonomy claims.[90] The Church says that this is the Catholic Church, Catholics will decide how it should be run, and the government should not be regulating the internal operations of the Church. A church should not have to show a particular doctrinal basis for every internal management decision. The faithful or the hierarchy, depending on church polity, ought to be entitled to run their own religious organization.

IV. THE ESTABLISHMENT CLAUSE AND STATE FUNDING OF RELIGIOUS ORGANIZATIONS

A. Funding of Secular Services by Religious Organizations

I can offer a quicker overview of Establishment Clause issues. The Supreme Court has struggled for fifty years now with the basic idea that government should be neutral towards religion. But there are two fundamentally inconsistent understandings of what it means to be neutral. For a long time, the Court never quite saw the difference. I think it sees the difference now, but key votes at the center of the Court are still hoping not to have to choose between the two models.[91]

One side—the no-aid side—says the base line for measuring neutrality is the government doing nothing. Zero going to the church is neutral. So any money that does go to the church is a departure from neutrality and is forbidden aid, forbidden endorsement, and so forth. That version of neutrality has dramatically affected the financing of Catholic schools.

But there is another way to measure neutrality, which also has strong support in the cases, but most clearly in cases from other contexts. The alternate base line for measuring neutrality is

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[90] *See* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1388–402 (1981).

[91] This overview is elaborated in Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997).

the government's treatment of a secular organization that is providing the same service as a religious organization. That base line is highly controversial in the school cases, but we take it for granted in the hospital cases. The secular hospital and the Catholic hospital get the very same Medicare and Medicaid reimbursement, because it does not matter that one is religious and one is secular. The important point is that they are delivering medical care to people. Treatment of comparable secular providers is a very different base line that also measures a way of talking about neutrality.

In the very first modern case, *Everson v. Board of Education*,[92] Justice Black blithely endorsed both definitions of neutrality in adjacent paragraphs. He seems not to have understood the conflict between them. The confusion has continued ever since.

For a time, the Court tried to carve out different spheres of influence for these two different versions of neutrality. In the free speech cases, the law for a long time has been to treat religious speech just like high-value secular speech.[93] In social services cases—hospitals, welfare agencies, drug abuse treatment centers—in general and without much litigation or debate, the rule has been to treat the religious provider just like the secular provider.[94] The recent charitable choice legislation has formalized that and raised it to a higher profile, at least in certain federal spending programs. Charitable choice laws say that when government contracts for social services with the private sector, it cannot discriminate on the basis of religion.[95] A state that contracts out must include religious providers on a nondiscriminatory basis, and it must do so without restricting their religious liberty. It cannot tell the church-run drug abuse center to take the crucifix off the wall. The combination of nondiscriminatory funding and preservation of religious liberty has provoked litigation. Some of my friends who claim to be

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[92] 330 U.S. 1 (1947).

[93] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

[94] *See* Bowen v. Kendrick, 487 U.S. 589 (1988); Bradfield v. Roberts, 175 U.S. 291 (1899).

[95] The enacted law is 42 U.S.C. § 604a (Supp. III 1997) (§ 104 of the Personal Responsibility and Work Opportunity Act of 1996 (more commonly known as the Welfare Reform Act)). The pending bills are the proposed Charitable Choice Expansion Act of 1999, part of S.2046 and H.R. 1607 in the 106th Congress.

ardent supporters of separation of church and state now claim that it is critically important to regulate the religious practices of agencies that accept federal money for their charitable functions.[96]

With respect to elementary and secondary education, the main tradition has not been nondiscrimination, but no-aid. The Court's starting point has been to say that no-aid is neutral and that any money is suspect. But the Court never fully committed to that. Everyone has heard the litany making fun of the odd distinctions the Court made—books but not maps, tax deductions but not tax credits, buses from home to school but not buses on field trips. The underlying cause of those silly distinctions was the Court's continuing attempt to have it both ways. The Court is pulled to the notion of no-aid. But it is also pulled to this idea of no discrimination, of treating the secular provider just like the religious provider.

The most recent cases show a sharp but not yet decisive move toward nondiscrimination. The effort to maintain separate spheres of influence for the two conceptions of neutrality may have collapsed in *Rosenberger v. Rector of University of Virginia*.[97] *Rosenberger* was both a free speech case and a funding case. The Court held that if the state university funds student magazines, it has to fund a student religious magazine. *Rosenberger* was not a K-12 case, and one magazine is less important than whole systems of church-affiliated schools. But in one important way, *Rosenberger* is a much more difficult case than the school cases. There was really no secular content in the magazine that was being funded. In the school cases, the children learn math, science, and reading; the state gets full secular value for its money. But in *Rosenberger*, the only secular value was the sheer concept of neutrality and non-discrimination.

Agostini v. Felton[98] held that federal Title I money, which is used to pay public school teachers to go into private schools and deliver remedial educational services, is valid. The Court said the services no longer have to be confined to so-called neutral sites; they no longer have to be delivered in trailers on street corners.

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[96] *See generally Debate 2: Should the Government Provide Financial Support for Religious Institutions That Offer Faith-Based Social Services*, 1 RUTGERS J.L. & RELIGION 1 (visited Sept. 17, 2000) <http://camlaw.rutgers.edu/publications/law-religion> (featuring The Honorable Louis H. Pollack, Glen A. Tobias, Erwin Chemerinsky, Barry W. Lynn, Douglas Laycock, and Nathan J. Diament).

[97] 515 U.S. 819 (1995).

[98] 521 U.S. 203 (1997).

That is a huge victory for the nondiscrimination view of neutrality. The Court largely abandoned its presumption that all aid would be diverted to religious purposes. It is going to make plaintiffs prove diversion instead of presuming diversion. That too is a huge step forward for the nondiscrimination version of neutrality.

Most recently, *Mitchell v. Helms*[99] upheld federal Chapter 2 money, which is used to buy books and equipment that are loaned to private schools. The plurality opinion for four justices clearly committed to the nondiscrimination understanding of neutrality: if the aid is secular in content, and if it is distributed on a per capita basis to all kinds of schools, it does not violate the Establishment Clause.[100] Excluding religious schools from such a program would raise serious questions under the Free Exercise Clause, because it would overtly discriminate against religion.[101] The plurality opinion formally reserves the questions whether direct cash payments would be different,[102] or whether aid that supplanted the school's own spending would be different.[103] But given the nondiscrimination logic of the opinion, there is little reason to think that these differences would change the result in the view of these four justices.

Justice O'Connor, who has long been the swing vote, concurred separately. Justice Breyer joined her opinion. He had dissented in both *Rosenberger* and *Agostini*, so this may be a significant change. As usual, Justice O'Connor wrote a narrow, fact-based opinion that reserved all questions not essential to the result. She sharply criticized the plurality for making nondiscrimination dispositive, but she agreed that it was very important.[104] She identified a number of other factors that had supported the result in *Agostini* and that were also satisfied here. It was unnecessary to decide if any of these were constitutionally required; taken together, they were certainly constitutionally sufficient.[105]

Even so, there are important indications of what Justices O'Connor and Breyer think is important. The cases from the 1970s insisted that aid be delivered in forms that could not be

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[99] 120 S.Ct. 2530 (2000).

[100] *See id.* at 2541-49 (plurality opinion by Thomas, J.).

[101] *See id.* at 2555 n.19.

[102] *See id.* at 2546-47.

[103] *See id.* at 2544 n.7.

[104] *See id.* at 2556-57 (O'Connor, J., concurring).

[105] *See id.* at 2572.

diverted to religious uses. The Court presumed that religious school teachers would violate the rule that government funds or equipment could not be used for religious purposes. Futhermore, close monitoring to prevent diversion was a forbidden entanglement. The result was that aid had to be delivered in forms that were incapable of diversion.

The Court has now decisively broken out of this catch-22. The *Mitchell* plurality says diversion to religious use does not matter.[106] If a computer is delivered for secular purposes and used for secular purposes, it is irrelevant if it is sometimes also used to access religious websites. Justices O'Connor and Breyer disagree. They say that diversion still matters, but they trust the good faith of teachers and officials in religious schools. They will not presume diversion; hence, they will not require elaborate monitoring procedures.[107] Evidence of diversion in certain schools does not invalidate the whole program.[108] In effect, they have put the burden on opponents of aid to conduct their own investigation of religious schools—not simply to ask in discovery what the state has already found—and to prove up widespread diversion to religious uses if that is happening.

Agostini and *Mitchell* overruled large portions of four cases.[109] This eliminates many of the inconsistencies in the Court's cases; the distinction between books and equipment is gone (and thus the distinction between books and maps and the puzzle over atlases). Of the cases that survive, far more uphold aid than strike it down. But the cases invalidating state subsidies for teacher pay have not been overruled,[110] and *Committee for Public Education v.*

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[106] *See id.* at 2547 (plurality opinion).

[107] *See id.* at 2567-71 (O'Connor, J., concurring).

[108] *See id.* at 2571.

[109] *See id.* at 2555 (overruling *Wolman v. Walter*, 433 U.S. 229 (1977), and *Meek v. Pittenger*, 421 U.S. 349 (1975), "to the extent that [they] conflict with this holding") (plurality opinion); *id.* at 2556 (O'Connor, J., concurring) ("To the extent that [they] are inconsistent with the Court's judgment today, I agree that those decisions should be overruled."); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (overruling *Aguilar v. Felton*, 473 U.S. 402 (1985), and the invalidation of the Shared Time program in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985)).

[110] *See* Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court has not overruled the invalidation of the Community Education program in *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The difference between the Community Education program and the Shared Time program was that the Community Education program was taught by religious-school teachers paid with public funds; the Shared Time program was taught by public-school teachers. *But compare* Committee for Pub. Educ. v. Regan, 444 U.S. 646

Nyquist,[111] invalidating tax credits for the middle class and scholarships for the poor, has not been overruled. So despite the fireworks, and the important holding on loaning equipment to religious schools, we are left pretty much where we were with respect to vouchers and other forms of cash assistance. There are four reasonably sure votes to uphold almost any form of nondiscriminatory aid to religious schools and the big questions are up to Justice O'Connor or new appointees. It is now possible that Justice Breyer would provide the fifth vote instead of Justice O'Connor, but past voting patterns make that seem unlikely.

These cases have crystallized the conflict between the two understandings of neutrality and focused the Court's attention on the conflict. The Court is divided four to two to three and there may be further subdivisions within each group. If you take *Rosenberger*, *Agostini*, and *Mitchell* to their logical conclusion, vouchers are constitutional—but no one should assume the cases will be carried to their logical conclusion. *Rosenberger* and *Agostini* and O'Connor's opinion in *Mitchell* left lots of lines of retreat—some plausible and some just silly. In *Rosenberger*, the Court said it mattered that the university did not send the check to the magazine, but rather that it sent the check to the copy shop.[112] More importantly, in *Agostini*, the line of retreat was that Title I money cannot be used to displace money that the school is already spending.[113] That is a real limit that would constrain what could be done with any sort of voucher programs. In Justice O'Connor's opinion in *Mitchell*, no-supplanting has become a factor to be considered, not necessarily a requirement.[114] But none of the Justices clearly said that government can give aid that supplants the school's own spending.

The O'Connor-Breyer rule against diversion of aid to religious uses would also be a problem for vouchers. Justices O'Connor and Breyer assume that religious school teachers will not divert secular books and equipment to religious uses; they are at least much more open to the assumption that religious school teachers will teach religious concepts and values throughout the

(1980) (upholding payment for portion of religious-school teacher's time spent administering and grading state prepared examinations, because state-prepared examinations were free of religious content).

[111] 413 U.S. 756 (1973).

[112] *See* Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 825, 842 (1995).

[113] *See Agostini*, 521 U.S. at 228–29.

[114] *See Mitchell*, 120 S.Ct. at 2572 (O'Connor, J., concurring).

curriculum.[115] They may think that cash that can be used to pay teachers is inherently for religious purposes, automatically diverted, or perhaps more accurately, not secular in the first place.

Variations on the voucher issue have been presented to state and federal courts around the country, often with both state and federal establishment clause claims, with mixed results and repeated denials of certiorari.[116] The Supreme Court so far has avoided the issue, perhaps because neither block of four will vote to grant certiorari until Justice O'Connor tips her hand. This battle is very much far from over.

The battle will not be over even if the Supreme Court squarely upholds vouchers against federal constitutional attack. At least three-fourths of the states have state constitutional provisions on funding sectarian schools that are much more explicit, and at first glance more stringent, than the federal Establishment Clause. Perhaps the most important development in the recent cases is that the Supreme Courts of Wisconsin and Ohio interpreted such clauses in the state constitution to mean basically the same thing as the federal Establishment Clause, and not to prohibit vouchers.[117] The Supreme Court of Vermont expressly rejected this reasoning with respect to its state constitution.[118] The

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[115] *See id.* at 2568.

[116] *Compare* Kotterman v. Killian, 972 P.2d 606 (Ariz. 1999) (upholding state tax credit for contributions to scholarship fund for private schools), *cert. denied* 120 S. Ct. 283 (1999), *cert. denied sub nom.* Rhodes v. Killian, 120 S. Ct. 42 (1999); Simmons-Harris v. Goff, 711 N.E.2d 203 (Ohio 1999) (rejecting state and federal establishment clause attacks on vouchers for low income students, but invalidating program on narrow and correctable state ground); Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998) (rejecting state and federal establishment clause attacks on vouchers for low income students), *cert. denied*, 525 U.S. 997 (1998); *with* Simmons-Harris v. Zelman, 72 F. Supp. 2d 834 (N.D. Ohio 1999) (invalidating the Ohio program upheld in *Simmons-Harris v. Goff*), *appeal pending*; Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539 (Vt. 1999) (invalidating unrestricted tuition reimbursement to religious schools, indicating that state could pay for secular instruction in religious school but not for religious instruction), *cert. denied sub nom.* Andrews v. Vermont Dept. of Educ., 120 S. Ct. 626 (1999); Holmes v. Bush, No. CV 99-3370, 2000 WL 526364 (Fla. Cir. Ct., March 14, 2000) (invalidating vouchers for certain low-income students under Florida constitution); *and* Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) (upholding statute authorizing tuition reimbursement to secular private schools but excluding secular private schools), *cert. denied*, 120 S. Ct. 329 (1999); Bagley v. Raymond Sch. Dept., 728 A.2d 127 (Me. 1999) (same), *cert. denied*, 120 S. Ct. 364 (1999).

[117] *See* Simmons-Harris v. Goff, 711 N.E.2d 203, 211–12 (Ohio 1999); Jackson v. Benson, 578 N.W.2d 602, 620–23 (Wis. 1998).

[118] *See* Chittenden Town Sch. Dist. v. Department of Educ., 738 A.2d 539, 559–60 (Vt. 1999).

meaning of state constitutions will have to be litigated separately in every state and state courts are likely to continue going both ways.

This means that religious schools face three independent hurdles: they have to win the political issue, they have to win the federal establishment-clause issue, and they have to win the state constitutional issue or amend the state constitution in each state. Or alternatively, they have to have to persuade the U.S. Supreme Court that refusal to fund religious schools violates the federal Free Exercise Clause. That is a quite plausible claim in those states that fund secular private schools but not religious private schools; it seems quite implausible in states that fund only public schools and refuse to fund any private schools.

B. Government-Sponsored Religious Speech

The longstanding desire for prayer in public schools and at government events has been principally an evangelical Protestant issue. Catholics opposed prayers and Bible reading in the schools in the nineteenth century, when liturgical differences were more sharply felt and Catholics were more sensitive to the Protestant establishment in the schools.[119] In our time, when evangelicals and Catholics alike feel threatened by secularism, Catholics have tended to support government's right to sponsor religious observances.[120] My own view is that Catholics were right the first time; government-sponsored prayer is bad for religious minorities and nonbelievers, and equally bad for the majority whose religion is politicized, diluted, and sometimes corrupted. The demand for such government sponsorship seems to be much stronger in evangelical communities than in Catholic communities; this is principally an issue in the Deep South.

The Supreme Court has been remarkably consistent for nearly forty years. Private religious speech, including prayers and worship services, is protected in public places, including on

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[119] For a summary of the nineteenth-century controversy over "the Protestant Bible," with citations to multiple sources, see Laycock, *supra* note 91, at 50–52.

[120] The United States Catholic Conference filed a brief supporting the school officials in *Lee v. Weisman*, 505 U.S. 577 (1992), the case on prayer at graduation. The Conference filed no brief in *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S.Ct. 2266 (2000), the case on student elections to include prayer at school events. *Lee* squarely presented the issue of whether public schools may sponsor prayers; *Santa Fe* did not, because the school denied its sponsorship.

government property and in public schools.[121] Government sponsored speech that takes a position on religious questions, including prayers and worship services, is generally forbidden, especially in public schools.[122] No case has approved government religious speech in public schools and no case has restricted private religious speech because of its religious content, anywhere.

With the basic principles clearly settled, litigators have been forced to press on the line between governmental and private speech. *Santa Fe Independent School District v. Doe*[123] illustrates the pattern. Both sides agreed that school-sponsored prayer was forbidden by the Establishment Clause, and that prayers of students in their private capacity were protected by the Free Speech and Free Exercise Clauses. The whole argument was whether these prayers were school-sponsored.

The Court did not think that was a close argument. The prayers in Santa Fe were delivered by a single student, elected by majority vote, given exclusive access to the microphone at an official school event. The majority found this obviously school-sponsored. The three dissenters did not really disagree. They invoked their earlier position that schools should be allowed to sponsor prayer after all, and they said the majority was premature in assuming that Santa Fe's election procedure would consistently lead to prayer. They did not give any comfort to the school's position that the elected speaker was not school-sponsored.

The opinion seems broad enough to dispose of elected student prayer leaders at athletic events, graduations, and any other official school event. The next round of litigation is likely to be over prayers and religious messages from valedictorians, who

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[121] *See, e.g.,* Santa Fe Indep. Sch. Dist. v. Doe, 120 S.Ct. 2266 (2000); Rosenberger v. Rector of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); Fowler v. Rhode Island, 345 U.S. 67 (1953); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Marsh v. Alabama, 326 U.S. 501 (1946); Jamison v. Texas, 318 U.S. 413 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[122] *See* Lee v. Weisman, 505 U.S. 577 (1992); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Stone v. Graham, 449 U.S. 39 (1980); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962). The only exceptions are *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding municipal Christmas display with creche, Santa Claus, and reindeer) and *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding prayer to open each meeting of legislature).

[123] 120 S.Ct. 2266 (2000).

(unlike the winners of elections) are selected by religiously neutral means. In some districts, this would lead to a healthy diversity of views over time; other districts have such a large majority of one faith, or cluster of similar faiths, that the valedictorian will usually represent the dominant religious view and any exceptions will be under enormous pressure to conform. This issue too is not likely to go away.

CONCLUSION

The Court is closely divided on all these issues: five-four on federalism, four-two-three on funding religious schools, six-three on school prayer, four-three with two undeclared on free exercise. The votes in the middle are potentially movable in response to new variations on old issues. New appointments are up for grabs.

Especially on free exercise and funding religious schools, there are deep ambiguities in present doctrine. Effective lawyers will make the most of those ambiguities; other lawyers will miss the opportunity. Just as it is better to light a candle than to curse the darkness, so it is better to develop the exceptions than to curse the adverse holdings.